83-357

IN THE SUPREME COURT
OF THE UNITED STATES

JAMES LAWRENCE CUNNINGHAM,

Appellant,

v.

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Appellees.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT
OF THE UNITED STATES

JAMES LAWRENCE CUNNINGHAM,
Appellant,

v.

JUDY BAKER INMAN GOLDEN
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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Does a state statutory scheme, construed to allow a married woman to assert the paternity of a married man, not her husband, but to deny a natural father standing to assert paternity and reestablish visitation with his child with whom he has established a substantial relationship solely because the mother cohabiting with him at the time of conception was still legally married to her now ex-husband, violate the due process and equal protection rights of the natural father and child.

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The Order of the Tennessee Supreme Court entered on May 31, 1983, the Opinion and Decree of the Tennessee Court of Appeals dated February 24, 1983, the Memorandum Opinion of the Fourth Circuit Court of Knox County, Tennessee delivered October 28, 1981, and the Order of the Fourth Circuit Court dismissing this cause dated December 7, 1981 are set out in the Appendix hereto. The decision of the Tennessee Court of Appeals is reported in 652 S.W.2d 910 (Tenn. App., 1983).

JURISDICTIONAL GROUNDS IN THIS COURT

This was a legitimacy proceeding brought under Tennessee Code Annotated §36-302 in the Fourth Circuit Court for Knox County, Tennessee, being the court of first instance, in which summary judgment was granted against Appellant on the basis of lack of standing to seek legitimation of this child under Tennessee Code Annotated §36-302 (hereinafter T.C.A.).

The federal consitutional question was timely raised by Appellant in the argument of the Motion for Summary Judgment in the Trial Court and has been continuously raised on appeal. On October 28, 1981 the Fourth Circuit Court for Knox County, Tennessee held for Appellees but did not address the meaning of the statute, basing his decision on the importance of the child's reputation, characterizing the Appellant as an interloper. On February 24, 1983 the

Tennessee Court of Appeals affirmed the decision of the Trial Court, adopting what Appellant submits is a strained construction of the applicable statute T.C.A. §36-302, defining the term "out of wedlock" to refer to the marital status of the mother, rather than the relationship of the parents. The Tennessee Court of Appeals did not pass on Appellant's assertion that the federal constitutional prohibition against denial of due process and equal protection would prohibit such a construction.

A timely application for permission to appeal was filed by Appellant on March 28, 1983 which asserted that the Court of Appeals' interpretation of the statute as being intended to apply only to children of unmarried women was an unconstituitonal interpretation, citing again as was cited in each court below Stanley v. Illinois, 405 U.S. 645 (1972) and Caban vs. Mohammed,

441 U.S. 380(1979). This application was denied on May 31, 1983. Notice of Appeal to this Court was timely filed on August 29, 1983.

The jurisdiction of the Supreme Court of the United States to review this decision of the Supreme Court of Tennessee denying permission to appeal from the decision of the Tennessee Court of Appeals, on appeal is conferred by 28 U.S.C. §1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Dahnke v. Walker Milling Company v. Bondurant, 257 U.S. 282(1921);

Lawrence v. State Tax Commission, 286 U.S. 276(1931);

Stanley v. Illinois, 405 U.S. 645;

Quillion v. Walcott, 434 U.S. 246;

Caban v. Mohammed, 441 U.S. 380;

Mills v. Habluetzel, 456 U.S. 91;

Pickett v. Brown, ___ U.S. ___, 103

S. Ct. 2199, 76 L. Ed.2d. 372 (1983); Lehr v. Robertson, ___ U.S. ___, 103 S. Ct. 2985, ___ L.Ed. 2d ___ (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant Tennessee statutes codified in Tennessee Code Annotated are as follows:

T.C.A. 36-301. Jurisdiction. -- The circuit, juvenile, probate and county courts have concurrent jurisdiction to legitimate children upon application by the natural father of said children. Said application may be filed in the county in which the father resides or in the county in which the children reside or are present when the application is made.

T.C.A. 36-302. Petition for Legitimation.- An application to legitimate a child not born in lawful wedlock is made by petition, in writing, signed by the person wishing to legitimate such child, and setting forth the reasons therefor and the state and date of said child's birth.

T.C.A. 36-222. Definitions. -- As used in this chapter, unless the context clearly requires otherwise:

(1) "Child" means a child born out of lawful wedlock.
(2) "Mother" means the mother of a child born out of lawful wedlock.
(3) "Court" shall mean the juvenile court.

T.C.A. 36-223. Liability of father of child born out of wedlock.-- The father of a child born out of wedlock is liable for the necessary support and education of the child. He is also liable to pay for the child's funeral expenses. He is liable to pay for the expenses of the mother's confinement and recovery, and is also liable to pay such expenses, including counsel fees, in connection with her pregnancy as the court in its discretion may deem

proper.

T.C.A. 36-224. Petition to establish paternity--Time of filing--Jurisdiction--Issuance of warrant.--(1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this chapter may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the state department of human services or by any person. Said petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father. After the death of the mother or in case of her disability said petition may be filed by the child acting through a guardian or next friend.

(2) Proceedings to establish the paternity of the child and to compel the father to furnish support and education for the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two (2) years from the birth of the child, unless paternity has been acknowledged by the father in writing or by the furnishings of support. Provided, however, that the department of human services or any person shall be empowered to bring suit in behalf of any child under the age of eighteen (18) who is, or is liable to

become a public charge.

(3) For the purpose of this chapter original and exclusive jurisdiction is conferred upon the juvenile court.

(4) The petition shall be verified by affidavit and shall charge the person named as defendant with being the father of the child and shall demand that he be brought before the court to answer the charge.

(5) The court shall issue a warrant for the apprehension of the defendant, directed to any officer in the state authorized to execute warrants, commanding him without delay to apprehend the alleged father and bring him before the court, for the purpose of having an adjudication as to the paternity of the child, and such warrant may be issued to any county of this state. But in the discretion of the court, a summons may be issued as in civil cases.

T.C.A. 36-141. Release of information concerning biological family.-- Upon written request of an adopted person ...(7) available health history of the biological parents and other biological relatives of the adopted person specifically including any known information which would be expected to have a substantial effect on the adopted person's mental or physical health.

28 U.S.C. §2403(b) may be applicable.

STATEMENT OF THE CASE

The facts stated in the Appellant's sworn Petition for Legitimation and his Affidavits are as follows:

James Lawrence Cunningham is the father of Daniel Todd Inman, born on November 16, 1977 to him and the Appellee, Judy Baker Inman Golden. At the time that Daniel Todd Inman was conceived, Judy Golden was separated from the Appellee, Steven Lee Inman, now her ex-husband, and did not have conjugal access to him. After the child was born, the Appellant and the Appellee, Judy Golden, lived together in a relationship, reported in a pediatric history compiled from information supplied by Appellee Judy Golden, as "parents very loving of child and vice versa". The Appellee, Judy Golden, expressly admitted on numerous occasions to many people that the Appellant, James Cunningham, was the father of her child, Daniel Todd Inman,

including the nurse to whom she related the pediatric history of the child. The Appellant and Appellee, Judy Golden, lived together after the birth of their child for a substantial period of time during which the Appellant performed all the usual parental activities with respect to his son and after Appellee, Judy Golden, separated from him he gave her financial assistance for the benefit of the child, both at her request and voluntarily, and enjoyed visitation with his child for some time thereafter. Less than four months after the Appellant, James Cunningham and the Appellee, Judy Golden, separated, the Appellant filed his petition to legitimate his son. Appellee Golden sued Appellee Inman for divorce when Daniel was eight years old, and left Appellant when Daniel was 2½ years old, marrying Mr. Golden shortly before Appellant filed his petition for legitimation.

Previously, in the case of Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W. 2d 467 (1964), the Tennessee Court of Appeals construed a companion statute, T.C.A. §36-222, to allow a suit by a married woman against a married man to prove her child was not the child of her husband, so as to receive support from the natural father. That statute defined "child" as "a child born out of lawful wedlock" and "mother" as "the mother of a child born out of lawful wedlock".

T.C.A. §36-302 provides in important part that the circuit... courts have...jurisdiction to legitimate children upon application by the natural father... T.C.A. §36-202 speaks of "an application to legitimate a child born out of wedlock, the same term used in the paternity statute construed in McFerren, supra. At the Trial Court level Appellant argued that as the natural father and having had

extensive ties to his child he had standing to petition for legitimation and to prove the child was, in fact, his and to re-establish visitation. He cited Stanley v. Illinois, 405 U.S. 645 (1972), and Caban v. Mohammed, 441 U.S. 380 (1979) in support of his due process and equal protection claims. The Trial Court did not address the issues raised by the Appellant, and did not make any definitive findings of fact, concluding,

> "Well, when I get through you will have it to where you can get the issues addressed unless the appellate courts want to dodge the issue.
>
> In my judgment the interest of this child is the paramount issue in this particular matter. In my judgment there is nothing anyone has that that is more precious than their reputation. You bastardize the child, you have taken the very foundation of that reputation away. I find no basis for this lawsuit. This individual, as far as this Court is concerned, is an interloper. Why pick on this lady, why did he not pick on any other woman.
>
> Now he says he has reasons. In my judgment we have attempted to attempt to put in a nice word of palimony on, I think, an appropriate Army word of

> shacking up. And I think people who shack up just get what they get when they shack up, and they get no legal rights until the appellate court tells me they do."

Appellant, in his brief before the Tennessee Court of Appeals, addressed the issue of standing, citing Stanley v. Illinois, supra, Caban v. Mohammed, supra, and Craig v. Boren, 429 U.S. 190 (1976). The Tennessee Court of Appeals did not address any of the constitutional questions raised by the Appellant, but instead based their decision on what Appellant asserts is a strained construction of the statutory language "not born in lawful wedlock", and their discernment of the intent of the Legislature, notwithstanding their recognition that "there may be factual situations, perhaps even those present in this case, where the father should have a right to assert paternity, but we believe it is a perogative of the Legislature to enumerate the exceptional circumstances which would

permit such a suit".

That this construction was strained is further shown by the fact that the Court relied on Gower v. State, 155 Tenn. 138, 290 S.W. 978 (1927), but in fact, cited language quoted therein from two ancient common law cases and omitted the very next sentence after the quotation which stated, "Such, however, is not the law of Tennessee (290 S.W. at 980).

Appellant, in his application for permission to appeal to the Supreme Court of Tennessee, raised these inconsistencies and constitutional questions, citing Stanley v. Illinois, supra, Caban v. Mohammed, supra and the case of R. McG. v. J.W. (Colo., 615 P.2d 66 (1980)), a case which is very much in point and was decided for the natural father on a basis of equal protection grounds. The Tennessee Supreme Court denied the application for permission to appeal

without comment.

THE FEDERAL QUESTION IS SUBSTANTIAL

Appellant, James Lawrence Cunningham, is the father of Daniel Todd Inman, born November 16, 1977 to him and the Appellee, Judy Baker Inman Golden. Appellee Golden did not have conjugal access to her husband during the period that Daniel Todd Inman was conceived. Appellee Golden, after the birth of the child, divorced her husband and cohabited with Appellant Cunningham. She expressly admitted on numerous occasions to many people that he was the father and stated that he was the father in a pediatric history compiled on May 7, 1980. The Appellant, James Cunningham, while living in a relationship described in the pediatric history as "parents very loving of child and vice versa", performed all the usual parental

activities in caring for his son, as he did in subsequent visits after the Appellant and Appellee separated. Less than four months after their separation the Appellant filed the Petition for Legitimation in the Fourth Circuit Court of Knox County, seeking additionally to re-establish visitation with his son. After the separation, the Appellant Cunningham, gave the Appellee Golden financial assistance for the benefit of his son, both at her request, and voluntarily.

In Stanley v. Illinois, 405 U.S. 645 (1972), a case involving an unwed father who had intermittently lived with the mother of his three children for eighteen years, and after her death, sought custody of his children, this Court stated,

> "The private interest here, that of the man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care,

> custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"
> (405 U.S. 651 at 1212, citations omitted)

After reviewing various authorities this Court observed,

> "These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial."
> (405 U.S. 652 at 1213)

In Caban v. Mohammed, 441 U.S. 380, this Court was dealing with a fact situation wherein a married man lived with a single woman between 1968 and 1973 and sired two children born in 1969 and 1971. Caban subsequently obtained a divorce from the first Mrs. Caban, and remarried in 1975. A legal struggle over custody and visitation ensued, and based on a New York statute which gave a putative father only a right to be heard in opposition to proposed step-father adoption, the New York Courts

afforded him only a hearing and did not consider him on an equal footing as a prospective adoptive parent. Notwithstanding the fact that Caban was married at the time of his cross-petition for adoption, married at the time of conception and birth of his two children, this court rightly characterized him as an "unwed father":

> "Indeed the Surrogate's decision in the present case, affirmed by the New Court of Appeals was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: ...(441 U.S. at 388)

In so characterizing a married man as an unwed father, we agree that the Court is making a correct analysis. A parallel analysis in the instant case would characterize Appellee Golden as an unwed mother, and the child as a child born out of wedlock, if Appellant Cunningham is successful in proving his

paternity. However, as the Tennessee Court of Appeals chose a strained construction of the legitimation statute, T.C.A. 36-302, inconsistent with this Court's analysis in Caban, Appellant asserts that this construction applied to the facts in his case, results in an impermissible gender-based distinction.

The facts in the case at bar demonstrate that Appellant, James Cunningham, had a substantial relationship which began while he was livng with his child until the child was about 2½ years old and with his subsequent visits which occurred during some of the four months between the parents separation and Appellant's filing of the legitimation petition. These facts clearly take the instant case outside the rule of Quillion v. Walcott, 434 U.S. 253 (1978) wherein Quillion

"Never exercised actual or legal

> custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child." (434 U.S. at 256)

Appellant would further distinguish Quillion by pointing out that the Appellant in Quillion failed to raise a claim in his jurisdictional statement that the applicable statutes as they applied to him made gender-based distinctions in violation of the equal protection clause and this Court did not consider that claim. (434 U.S. 253, note 13)

Under the statutes struck down as unconstitutional in Caban, supra, the unwed mother had the authority to block the adoption of her child by witholding consent. The unwed father had no similar control even when his parental relationship was substantial. The statutory scheme in question in the case at bar, as it has been interpreted by the Tennessee Court of Appeals, permits an "unwed"

mother, even if she is married, to establish that an "unwed" father, even if he is married, is the father of the child, pursuant to T.C.A. §36-224, while the strained construction of T.C.A. §36-302 as interpreted by the Tennessee Court of Appeals would deny the unwed father the right to establish paternity through legitimation, solely because the "unwed" mother of the child was married, though separated, at the time of conception. Thus this statutory scheme as construed makes a gender-based distinction which cannot withstand judicial scrutiny under the equal protection clause.

In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), this Court reiterated that

> "A parent's interest in the accuracy and injustice of the decision to terminate his or her parental rights is a commanding one."
> (452 U.S. at 27)

In Lehr v. Robertson, ___ U.S. ___,

103 S.Ct. 2985, ___ L.Ed.2d ___, (1983), this Court dealt with an unwed father who was trying to prevent a stepfather's adoption in order to pursue his attempts to establish regular visitation . The Court observed:

> "Jessica's parents are not like the parents involved in Caban...appellant never established any custodial, personal, or financial relationship with his [child]. If...the other parent has either abandoned or never established a relationship, the equal protection clause does not prevent a state from according the two parents different legal rights."
> (___ U.S. at ___, 103 S.Ct. at 2996-2997, ___ L.Ed.2d at ___).

This Court in Lehr distinquished Caban by pointing out:

> "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the in the rearing of his child' [Caban, 441 U.S. at 392], his interest in personal contact acquires substantial protection under the due process clause."
> (___ U.S. at ___, 103 S.Ct. at 2993, ___L.Ed.2d at ___).

Tennessee courts have, in a case involving an unmarried mother, and an

unwed father petitioning to set aside a completed adoption, gone far beyond Lehr. In In Re Riggs, 612 S.W.2d 461(Ct. of App. 1980), Tennessee and U.S. cert. den., the putative father, Terrazas had never supported or even seen the child, but had made efforts to find and get custody of the child. Rejecting the adoptive parents characterization of Terrazas as the mere "sperm impregnator" of the birth mother, the Court concluded

> "In the instant case, the [putative father] established, through his sperm and through his efforts to find his natural child, such a relationship with the child as to entitle him to due process of laws in any proceeding adverse to his parental rights."
> (612 S.W.2d at 468)

The Court then upheld the Chancellor's award of exclusive custody of the child to Terrazas, setting aside the Georgia adoption, and thus removing the 1¼ year old child from its adoptive home where he had been since 3 days after birth.

In Frazier v. McFerren the Tennessee Court of Appeals allowed a married mother, still married to the husband to whom she was married when she conceived her child, to prove her husband was not the father, and to further prove that a married man was the father. The only interest was child support. i.e. the "shifting economic arrangements" referred to in Stanley (405 U.S. at 651) as not requiring protection. There was no showing in McFerren that the child would suffer without this child support, and this was not a case brought by the state to recoup "welfare payments". In neither Tennessee case cited above was the Court at all concerned that

> "a statute which was enacted for the benefit of children could be used to make those presumed in law to be legitimate illegitimate so that they then could be made legitimate again."

as the Tennessee Court of Appeals was in the instant case. (Appendix p. 46)

Tennessee denies Appellant and his child equal protection when it does not afford them the substantive due process rights afforded in In Re Riggs and McFerren, supra.

This Court in Pickett v. Brown, ___ U.S. ___, 103 S.Ct. 2199 , 76 L.Ed.2d 372 (1983) was quick to point out that in paternity actions it is "the child's interests that are at stake." (___ U.S. at ___, 103 S.Ct. at 2208, n. 15, 76 L.Ed.2d at 385). Moreover, this Court has stated that "it is the child who has an interest in establishing a relationship to his father" in addition to its interest in obtaining paternal support.(Id, n. 13). Justice O'Connor also emphasized an extremely relevant point in her concurring opinion in Mills when she stated "the mother's and child's interests are not congruent". (456 U.S. at 105, n. 4)

Appellant and Daniel Todd should

receive full-blown due process and equal protection rights under the Fourteenth Amendment. However, the Tennessee statutory scheme as interpreted by the Appeals Court penalizes Daniel Todd by not allowing him to know, love, and receive support from his natural father, and thus according to the fundamental concepts of ordered liberty protected by the due process and equal protection clauses of the Fourteenth Amendment, the mother should not have an unqualified right to refuse to cooperate in legal proceedings intended to determine the paternity of her child when the father has no similar right to refuse cooperation in a paternity action. In a case such as the present the child has a right to know its father and the father and the child have a right to continue a substantial, loving, and familial relationship.

The Tennessee Court of Appeals in

the instant case recognizes that T.C.A. §36-302 was enacted for the benefit of children, but totally disregards the true interest of children to know their natural father and to share a natural, loving parent-child relationship with him. It also ignores the need of the child to know who his father is for medical reasons which could have far-reaching effects on his health. Before this case was decided in the Tennessee Court of Appeals, the Tennessee Legislature recognized these benefits by providing in T.C.A. §36-141 a method for adoptive parents or adopted children to discover,

> "Available health history of the biological parents and other biological relatives of the adopted person specifically including any known information which would be expected to have a substantial effect on the adopted person's mental or physical health." (T.C.A. §36-141(7))

Tennessee would treat Daniel Todd

Inman differently in denying him the right to know who his natural father is and to continue a substantial relationship with him by saying, 'But you have a presumed father, your mother's ex-husband. Therefore, you are presumed legitimate and thus not entitled to the protection that Gomez v. Perez, 409 U.S. 535 (1973) and Pickett, 76 U.S. 372 , 103 S.Ct. 2199, ___ L.Ed.2d ___ (1983) afford illegitimate children.' By saying this the state sets up a third category of children who will not be afforded the rights of the other two categories: the actual children of married parents will know their father; the "illigitimate" children of married and unmarried men may know their father, so long as their mother was unmarried at the time of conception; and those such as Daniel Todd who may not know their father because their mother was married, to a man not the father of her child, at the time

of conception.

The Tennessee Court of Appeals makes no attempt to justify these classifications as having "an evident and substantial relation to the particular...interests [the] statute is designed to serve." (United States v. Clark, 445 U.S. 23, 27 (1980), citing Lalli v. Lalli, 439 U.S. 259,268 (1978)). Nor could it.

The Supreme Court of Colorado in R. McG. and C.W. v. J.W., 615 P.2d 666, (1980), a case very similar to the case at bar, but with less compelling facts, considered the interests of the child, and intimated that the best interests of the child were not co-extensive with those of his mother's husband. After an equal protection analysis, the Court concluded that R. McG. could proceed to prove his paternity of a child born to J.W. while she was married to W.W., to whom she was married continuously from

the time of conception.[1] See also the well-reasoned dissent of Chief Justice Rose in A v. X,Y, and Z, 641 P.2d 1222, 1228 (1982).

1 This Court has not, as far as Appellant has determined, heard a case where the HLA blood tests were used to prove rather than disprove paternity. This Court has recognized their accuracy to disprove paternity. Mills v. Habluetzel, 456 U.S. 91, 98, n.4 (1982), Little v. Streater, 452 U.S. 1, 6 (1981). Many state courts, including the Colorado Supreme Court, have recognized the accuracy of these tests to prove paternity. In R. McG. HLA tests found a 98.89% certainty of paternity. See also Buechlers v. Vinsand, (Iowa, 318 N.W.2d 208, 1982), 98.06%; Varney v. Young, (Mich. App., 308 N.W.2d 276, 1981), 96.6%; McGarrity v. Mengel, (Pa., 429 A.2d 1162, 1981),98%; Calahan v. Landry, (La. App., 402 So.2d 782, 1981), 99.06%; G. v. G., (Tx. App., 647 S.W.2d 74, 1983), 98.9%; FJF v. FMF, (So. Dak., 512 N.W.2d 718, 1981), 97.27%; Crane v. Crane, (Idaho, 662 P.2d 538, 1983), 98.98% and others. These cases demonstrate that paternity as well as non-paternity can be determined with great certainty, so that there is little danger of incorrect determinations.

CONCLUSION

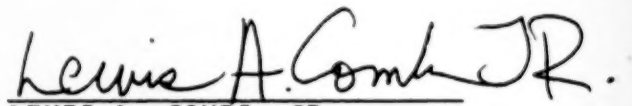
In Stanley v. Illinois, Quillion v. Walcott, Caban v. Mohammed, and Lehr v. Robertson this Court has set the standards to measure those interests of a biological father in his child deserving of constitutional protection. Pickett v. Brown emphasizes the interests of the child in knowing his natural father.

This appeal presents the parental rights of a father who lived with, cared for, and supported his child, and concerns his child's right to know his natural father and continue their "very loving" relationship. These substantial relationships deserve protection under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, especially because of Tennessee's recognition of lesser rights under McFerren and Riggs.

This Court should therefore note

jurisdiction and give plenary consideration to the constitutional rights of unwed fathers and their children to continue their substantial, loving relationships.

Respectfully Submitted,



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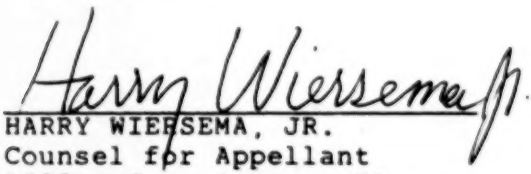

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JAMES LAWRENCE CUNNINGHAM,

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and STEVEN LEE INMAN,

Appellees.

APPENDIX

IN THE FOURTH CIRCUIT COURT
FOR KNOX COUNTY, TENNESSEE

JAMES LAWRENCE CUNNINGHAM,

Petitioner

FILED
Mar 25 1982

v.

No. 28077

JUDY BAKER INMAN GOLDEN,

Respondent and
Counter-Plaintiff

and

STEVEN LEE INMAN,

Respondent

TRANSCRIPT OF PROCEEDINGS
(MEMORANDUM OPINION)
October 28, 1981

THE COURT: Well, when I get through you will have it to where you can get the issues addressed unless the appellate courts want to dodge the issue.

In my judgment the interest of this child is the paramount issue in this particular matter. In my judgment there is nothing that anyone has that is more precious than their reputation.

You bastardize the child, you have taken the very foundation of that reputation away. I find no basis for this lawsuit. This individual, as far as this Court is concerned, is an interloper. Why pick on this lady, why did he not pick on any other woman.

Now, he says he has reasons. In my judgment we have attempted to attempt to put a nice word of palimony on, I think, an appropriate Army word of shacking up. And I think people who shack up just get what they get when they shack up, and they get no legal rights until the appellate court tells me they do.

And the suit will be dismissed.

(whereupon, the hearing was ended.)

March 8, 1982

[Signed]
George S. Child, Jr.
Judge

IN THE FOURTH CIRCUIT COURT
FOR KNOX COUNTY, TENNESSEE

JAMES LAWRENCE CUNNINGHAM,

Petitioner and
Counter-Defendant,

v. No. 28077

JUDY BAKER INMAN GOLDEN.

Respondent and
Counter-Plaintiff,

and

STEVEN LEE INMAN,

Respondent.

ORDER

This cause came on to be heard before the Honorable George S. Child, Jr., Judge of the Fourth Circuit Court for Knox County, Tennessee, on October 28, 1981, upon the Complaint of the Petitioner, the Respondent's Motion for Summary Judgment, the argument of counsel, and from the entire record, it appearing to the Court that there is no genuine issue

of material fact in this cause, and the Court finds that the Respondents are entitled to a judgment as a matter of law, because Petitioner does not have standing to contest the paternity and dispute the legitimacy of Respondent's child and the interest of the child in retaining his current status of legitimacy is paramount.

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. That the Complaint filed by the Petitioner in this cause is dismissed with predjudice.

2. That summary judgment is hereby granted in favor of the Respondents on the Petition for Legitimation.

3. The memorandum opinion of this Court is incorporated herein by reference as if copied herein verbatim.

4. The costs in this cause are to be taxed against the Petitioner, for which execution may issue if necessary.

ENTER this the 7th day of December, 1981.

/S/
JUDGE

APPROVED FOR ENTRY:

/S/
LEWIS A. COMBS, JR.
Attorney for James Lawrence Cunningham

/S/
WILSON S. RITCHIE
Attorney for Judy Baker Inman Golden

/S/
FRANK L. FLYNN, JR.
Attorney for Steven Lee Inman

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

JAMES LAWRENCE CUNNINGHAM,	FILED Feb 24 1983
Plaintiff-Appellant	Knox Law C.A. #861
v.	
JUDY BAKER INMAN GOLDEN and STEVEN LEE INMAN,	Hon. Goerge S. Child, Jr. Judge
Defendants-Appellees	AFFIRMED

LEWIS A. COMBS, JR. and HARRY WIERSEMA, JR. OF KNOXVILLE FOR APPELLANT

WILSON S. RITCHIE and ANN C. SHORT OF KNOXVILLE FOR JUDY BAKER INMAN GOLDEN

FRANK L. FLYNN, JR. OF KNOXVILLE FOR STEVEN LEE INMAN

OPINION

Goddard, J.

James Lawrence Cunningham, Plaintiff-Appellant, appeals dismissal by summary judgment of his suit against Judy Baker Inman Golden and Steven Lee Inman, Defendants-Appellees. The critical issue raised is whether the Trial Court was

correct in finding that the material facts show without dispute that the Plaintiff could not assert his paternity of Mrs. Golden's minor child who was conceived and born while Mrs. Golden was separated from but engaging in conjugal visits with her husband, Steven Lee Inman.

The controlling statutes are found in Chapter 3 of Title 36, T.C.A., particularly Section 36-302, which provides as follows:

> 36-302. Petition for legitimation.- An application to legitimate a child not born in lawful wedlock is made by petition, in writing, signed by the person wishing to legitimate the child, and setting forth the reasons therefor and the state and date of said child's birth.

The Defendants contend that the father cannot bring this case under Chapter 3 because the child was born in wedlock. On the other hand, the Appellant contends that because he is the father of the child, the child was born out of wedlock, and that he is properly maintaining the suit.

Before addressing the case specifically,

it is well to remember that proceedings to legitimate children, whether at the instance of the mother or the putative father, were unknown at common law and are exclusively a creature of the Legislature and that the forerunner of the statute under consideration here was adopted as Chapter 2 of the Public Acts of 1805.

Reduced to its simplest forms, this case turns on whether "out of lawful wedlock" should be read to mean only an unmarried woman or to include a married woman who is not married to the father of the child.

Our research discloses only one jurisdiction[1] which has given the language the former meaning, while a number of others[2] all of which are suits initiated by the mother - adopt the latter.

One Tennessee case has also touched on the question. In Frazier v. McFerron,

55 Tenn. App. 431, 402 S.W.2d 467 (1964), the Court was dealing with a suit brought under Chapter 2 of Title 36, the bastardy statute. Judge Carney points out that there seems to be a contradiction between the definition sections which speak of a child born out of wedlock and a later section of the statute which states that the mother and her husband may be competent witnesses, thus implying that a child is born out of wedlock only when the mother is unmarried.

In resolving the question, we note that our courts have repeatedly spoken of the presumption of legitimacy accorded a child born in wedlock.[3] Mr. Chief Justice Green reiterated the doctrine in Gower v. State, 155 Tenn. 138, 142, 290 S.W. 978, 980 (1927), detailing its origin under the English law:

> There is everywhere a presumption that a child born in wedlock is legitimate. It was the common law that, if the husband be within the four seas

(that is, within the jurisdiction of England), and his wife have issue, no evidence is admissible to prove the child a bastard, except in the sole case of an apparent impossibility of procreation by the husband - as of his not having attained the age of puberty, etc. Cannon v. Cannon, 26 Tenn. (Humph) 410.

This presumption obtained as to a child born in marriage, no matter how soon after the marriage a birth followed; that is to say, the child was presumed to be legitimate, unless it was shown that the husband was impotent or beyond the four seas during the period when the child must in the course of nature have been begotten. Jackson et al. v. Thornton et al., 133 Tenn. 36, 179 S.W. 384.

As to children born after the death of the father, the common law went to extraordinary lengths to hold them legitimate:

"In the time of Edward II, the Countess of Gloucester bore a child one year and seven months after the death of the duke, and it was pronounced legitimate. In the reign of Henry VI Mr. Baron Rolfe expressed the opinion with apparent gravity, that a widow might give birth to a child seven years after her husband's death without injury to her reputation." [which leads one to question the gentleman's opinions or the lady's prior reputation] Dickinson's Appeal, 42 Conn. 491, 19 Am Rep. 553.

If the Plaintiff is correct that

"born out of lawful wedlock" means a child born to a woman who is not married to the father, it would seem to follow that "a child born in lawful wedlock" would mean a child born to a woman married to the father. Thus, by definition, the child would be legitimate and no presumption need be indulged. We conclude that for this presumption of legitimacy to make sense a child born in wedlock must mean a child born to a married woman and a child born out of wedlock one born to an unmarried woman.

Moreover, we are persuaded that in 1805, or for that matter in 1955, when the statute was codified, the Legislature intended to make it applicable only to children of unmarried women, and did not intend that a married woman living happily with her husband and three children should be forced into court to respond to a petition of this type filed by

a man who might allege only a single isolated indiscretion.

It is true that the facts of the case at bar are more aggravated than those above postulated, but if we permit the Plaintiff to proceed in this case, thus putting Mrs. Golden to her proof, it would also be necessary to permit the man in the case hypothesized to also proceed and require the woman to also respond. In this regard we recognize that there may be factual situations, perhaps even those present in this case, where a father should have a right to assert his paternity, but we believe it is the prerogative of the Legislature to enumerate the exceptional circumstances which would permit such a suit.

Further, we believe that there is some merit in the Defendants' argument that these Code Sections contemplate a non-adversarial proceeding, such as those

relating to a change of name. T.C.A. 29-8-101--105.

Finally, it seems anomalous to us that a statute which was enacted for the benefit of children could be used to make those presumed in law to be legitimate illegitimate so that they then could be made legitimate again.

For the foregoing reasons the Trial Court is affirmed and the cause remanded for collection of costs below. The costs of appeal are adjudged against the Plaintiff and his surety.

/S/
HOUSTON M. GODDARD,
Judge

CONCUR:

/S/
Clifford E. Sanders, J.

/S/
Herschel P. Franks, J.

1 Commonwealth Department v. Helton, 411 S.W.2d 932 (Ct. App.Ky. 1967).

2 Pursley v. Hisch, 85 N.E.2d 270 (Ind.Ct.App.1949); State v. Coliton, 17 N.W.2d 546 (N.D.1945); F. v. H., 546 P.2d 765 (Ore.Ct.App. 1976); Commonwealth v. Shavinsky, 101 A.2d 178 (Pa. Super. Ct. 1953).

3 Jackson, et al. v. Thornton, et al., 133 Tenn. 36, 179 S.W. 384 (1915); Cannon et ux. v. Cannon, et al., 26 Tenn. 410 (1846); Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467 (1964); Anderson v. Anderson, 52 Tenn.App. 241, 372 S.W.2d 452 (1962); State ex rel. Hardesty, et al. Sparks, et al., 28 Tenn.App. 329, 190 S.W.2d 302 (1945).

IN THE COURT OF APPEALS
EASTERN DIVISION
AT KNOXVILLE, TENNESSEE

DECREE

FILED
FEB 24, 1983

JAMES LAWRENCE CUNNINGHAM,

Plaintiff-Appellant,

v.

Knox Law

JUDY BAKER INMAN GOLDEN

Defendants-Appellees

AFFIRMED and REMANDED

This cause coming on to be heard upon a transcript of the record from Circuit Court of Knox County, assignments of counsel, upon consideration whereof the Court is of the opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that this case be and hereby is remanded to the Circuit Court of Knox County for

entry and enforcement of its final order as here affirmed, for collection of the costs adjudged in the trial court, and for any further proceedings necessary consistent with the opinion of this Court, a copy of which shall accompany the procedendo upon the remand to the court below.

The costs of this appeal are adjudged in this Court against the plaintiff-appellant, James Lawrence Cunningham, and for which let execution issue.

Goddard, J.
Sanders, J.
Franks, J.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JAMES LAWRENCE CUNNINGHAM,

Plaintiff-Appellant

FILED
May 31, 1983

v.

Knox Law

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Defendants-Appellees

ORDER

Upon consideration of the application for permission to appeal filed by the Appellant and the answer of the Appellees, the briefs of counsel and the entire record, the Court is of the opinion that the application should be and the same is hereby denied.

Costs will be borne by the Appellant.

PER CURIAM

IN THE SUPREME COURT OF THE
STATE OF TENNESSEE

JAMES LAWRENCE CUNNINGHAM,

Appellant,

v. C.A. No. 28077

JUDY BAKER INMAN GOLDEN
and STEVEN LEE INMAN,

Appellees

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James Lawrence Cunningham, the Appellant above named, hereby appeals to the Supreme Court of the United State from the final order denying permission to appeal, entered herein on May 31, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

/S/
Harry Wiersema, Jr.
Attorney for James
Cunningham

/S/

Harry Wiersema, Jr.
Attorney for James Cunningham
Suite 1200, Andrew Johnson Plaza
912 South Gay Street
Knoxville, Tennessee 37902
615-524-7496

CERTIFICATE OF SERVICE

I, Harry Wiersema, Jr., hereby certify that a true and exact copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been mailed with postage prepaid to the Attorney General of the State of Tennessee, William M. Leech, Jr., 450 James Robertson Parkway, Nashville, Tennessee 37219; Wilson S. Ritchie, Suite 2301, United American Plaza, Knoxville, Tennessee 37929-2301, attorney for Appellee Judy Baker Inman Golden; and Frank L. Flynn, Suite 600, Walnut Building, Knoxville, Tennessee 37901, attorney for Steven Lee Inman, this 29th day of August, 1983.

/S/

Harry Wiersema, Jr.
Attorney for Appellant
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Knoxville, Tennessee 37902
615-524-7496